

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)	3:13-cr-00011-HDM-WGC
)	3:14-cv-00650-HDM
Plaintiff,)	
)	
vs.)	ORDER
)	
BYRON TRENT DAVIS,)	
)	
Defendant.)	
_____)	

Before the court is the defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (#45). The government has responded (#64).

I. Procedural History

On January 23, 2013, the grand jury returned an indictment charging defendant with a single count of receipt of child pornography. On August 28, 2013, defendant pleaded guilty to a superseding information that charged him with one count of possession of child pornography. On December 10, 2013, the court sentenced defendant to 63 months in prison and a 15-year term of supervised release. Defendant did not file any notice of appeal. Instead, on December 15, 2014, he filed his petition for relief under § 2255.

1 **II. Facts**

2 On November 27, 2012, law enforcement officers executed a
3 search warrant of defendant's home. The agents entered the home
4 with their guns drawn. Defendant, his wife, and their then five-
5 year-old son were all present.

6 The agents interviewed defendant and seized his computers and
7 other electronic equipment. During the interview, defendant
8 admitted that he had viewed child pornography on his computer.
9 Forensic analysis of the equipment confirmed that defendant had
10 accessed about 100 videos and 100 images of child pornography, and
11 that the files included depictions of prepubescent children and
12 sadistic and masochistic conduct.

13 Defendant claims he was in shock and emotional distress during
14 the search, and that immediately after he was taken to a hospital
15 and admitted overnight. His emotional distress persisted
16 throughout the criminal proceedings, defendant claims, and he
17 suffered from very severe depression, anxiety, panic attacks, and
18 PTSD.

19 The day after the search, defendant met with attorney Mary
20 Boetsch. Defendant claims that Boetsch said she specialized in
21 child pornography cases and was an expert. Boetsch denies telling
22 defendant she was an expert or that she specialized in child
23 pornography cases. (Doc. #65 (Boetsch Aff. 2)). Defendant claims
24 he told Boetsch that he was innocent and wanted to fight the
25 charges. He explained that any child pornography on his computer
26 had been accidentally downloaded and immediately deleted after
27 being found. (Doc. #45-2 (Decl. 15)). Defendant claims that
28 Boetsch said that "she would seek to 'make this go away' without

1 charges being brought; and that she would seek to have the charges
2 dropped if an Indictment was issued." (Doc. #45 at 10). Boetsch
3 denies telling defendant that she could "make it go away." (Doc.
4 #65 (Boetsch Aff. 2)).

5 Boetsch told defendant that she charged \$300.00 per hour and
6 required a \$10,000.00 retainer. Defendant asserts that Boetsch
7 said this would probably cover all fees unless the case went to
8 trial, which would cost an additional \$15,000.00 to \$20,000.00.
9 (Doc. #45 at 10). Boetsch says she told defendant she had "no idea
10 how much it would ultimately cost." (Doc. #65 (Boetsch Aff. 2)).
11 A few days after their meeting, defendant retained Boetsch to
12 represent him.

13 Boetsch reviewed the evidence, including the tape recorded
14 interview and the child pornography downloads on defendant's
15 computers. (Doc. #65 (Boetsch Aff. 2-3)). The interview Boetsch
16 found "ambiguous in places and devastating in others." (Doc. #65
17 (Boetsch Aff. 2)). Boetsch concluded that while an argument for
18 suppression could be made, she did not think it would prevail. *Id.*
19 Further, even if the statements were suppressed, she saw no basis
20 for suppression of the search results, and defendant's computers
21 clearly contained deleted child pornography images and videos. *Id.*
22 at 2, 4 ("[T]here was never any question but that . . . child
23 pornography images would be found on his hard drive."). Boetsch
24 met with the prosecutor and two other defense attorneys and after
25 those meetings determined that the software used by the government
26 to ascertain the number of videos on computers was "quite
27 reliable." *Id.* at 3-4. Boetsch and her investigator then tried to
28 replicate whether child pornography could be accidentally

1 downloaded in the way defendant claimed, but they could not do so.
2 *Id.* at 4. Defendant's explanation of accidental downloads would
3 require his testimony, Boetsch concluded, but not only was part of
4 defendant's explanation incredible, after several practice sessions
5 it was evident defendant's testifying itself was problematic, and
6 defendant agreed that he should not testify. *Id.* at 2-3.

7 At that point, "the focus of the case . . . became receiving
8 probation." *Id.* at 5. Probation was unavailable on the original
9 charge, and the government's position was that defendant either
10 plead guilty to the original charge or, if he went to trial, he
11 could face additional charges. *Id.* Boetsch began negotiating in
12 an attempt to obtain an agreement that would allow defendant to
13 plead to a lesser charge. *Id.*

14 By July 2013, defendant was experiencing financial
15 difficulties. Defendant told Boetsch that he was not going to be
16 able to pay her much longer. A few weeks later, defendant claims
17 that Boetsch told him that "his financial condition left him no
18 choice but to cut a plea deal," that he could not go to trial, that
19 she would have to quit if he ran out of funds, that he "better have
20 a 'Plea Deal' in place before she did; because at that point [he]
21 would not have any attorney," and that she would try to get him a
22 "Plea Deal for Probation." (Doc. #45 at 10; Doc. #45-2 at 23
23 (Davis Decl. ¶ 89)). Boetsch denies telling defendant that she
24 would abandon him if he could not pay and says she in fact advised
25 him they could take the matter to trial. (Doc. #64 (Boetsch Aff.
26 6-7)).

27 Eventually, the government agreed to allow defendant to plead
28

1 to a lesser charge of possession.¹ *Id.* at 5-6. On August 27,
2 2013, Boetsch advised defendant of the plea offer. Defendant
3 claims that Boetsch said it was a plea deal "for probation."
4 Boetsch denies this. In fact, she says she advised defendant that
5 while they could argue for probation, the decision was ultimately
6 up to the court and defendant could very well be facing prison
7 time. (Doc. #65 (Boetsch Aff. 6)). Boetsch claims that she
8 "expressed [her] belief to [defendant] on several occasions . . .
9 that [she] did not believe he would get probation but that [they]
10 would certainly fight for it." *Id.* at 7. She states that
11 defendant "was not happy with that opinion but indicated . . . that
12 he understood." *Id.*

13 On August 28, 2013, defendant signed the plea agreement, under
14 which he agreed to plead guilty to one count of possession of child
15 pornography. In the agreement, he also stipulated to a Guidelines
16 calculation that was based on several enhancements and recognized
17 that his interview with agents on November 27, 2012, was
18 consensual. Defendant maintains that he did not knowingly agree to
19 these terms because he did not read the agreement before signing
20 and relied on Boetsch's alleged representations that it was a plea
21 agreement "for probation."

22 After signing the agreement, defendant appeared before the
23 court and entered his change of plea. Following a lengthy canvass
24 during which the defendant admitted to the court that his plea was
25 being entered freely and voluntarily, that his attorney had not

26
27 ¹ In part, Boetsch claims, this concession came after Boetsch pointed
28 out that motions to suppress could be filed based on the agents' conduct
during the search, including their pointing a gun at defendant's five-year-
old child.

1 promised him anything or threatened him in order to get him to
2 plead guilty, and that he was indeed guilty of the offense to which
3 he was pleading, the court accepted defendant's change of plea.

4 Defendant now claims that his plea was not knowing and
5 voluntary and that he did not in fact agree to the terms of the
6 plea or the admissions made in the agreement. Defendant claims
7 that before changing his plea, Boetsch gave him "specific and stern
8 warnings not to 'make any waves,' and to 'just say yes' to whatever
9 the Judge asks." (Doc. #45-1 at 8). Defendant further asserts
10 that he entered the plea agreement only because Boetsch threatened
11 to abandon him if he did not, even though he believed himself to be
12 innocent. Finally, defendant asserts that he was mentally
13 incompetent because he was abusing medications and alcohol and was
14 so depressed and anxious that he "could barely function."

15 **III. Standard**

16 Pursuant to § 2255, a federal inmate may move to vacate, set
17 aside, or correct his sentence if: (1) the sentence was imposed in
18 violation of the Constitution or laws of the United States; (2) the
19 court was without jurisdiction to impose the sentence; (3) the
20 sentence was in excess of the maximum authorized by law; or (4) the
21 sentence is otherwise subject to collateral attack. *Id.* § 2255.

22 Defendant's petition raises eight grounds for relief alleging
23 ineffective assistance of counsel. At least one ground claims
24 ineffective assistance based on an alleged conflict of interest.

25 Ineffective assistance of counsel is a cognizable claim under
26 § 2255. *Baumann v. United States*, 692 F.2d 565, 581 (9th Cir.
27 1982). In order to prevail on a such a claim, the defendant must
28 meet a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687

(1984). First, the defendant must show that his counsel's performance fell below an objective standard of reasonableness. *Id.* at 687-88. "Review of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation." *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1986). Second, the defendant must show that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687. This requires showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

"Effective assistance of counsel 'includes a right to conflict-free counsel.'" *United States v. Baker*, 256 F.3d 855, 859-60 (9th Cir. 2001), *amended* 2001 WL 474147 (9th Cir. 2001). "To establish a Sixth Amendment violation of defendant's right to the effective assistance of counsel based on an attorney's conflict of interest, 'a defendant must show: (1) his attorney actively represented conflicting interests, and (2) an actual conflict of interest affected his attorney's performance.'" *Quintero v. United States*, 33 F.3d 1133, 1135 (9th Cir. 1994). A conflict can include a conflict between a client and his lawyer's personal interests. *Baker*, 256 F.3d at 860.

IV. Analysis

A. Ground One

Defendant's first ground for relief asserts ineffective assistance of counsel based on a financial conflict of interest.

1 Defendant claims Boetsch coerced him into pleading guilty after he
2 told her he was running out of money and that Boetsch's interest in
3 getting paid improperly - and to defendant's detriment - conflicted
4 with defendant's interests.

5 The government argues that defendant's current claims are
6 contrary to sworn statements he made to the court during his change
7 of plea hearing.² The court agrees. At his change of plea,
8 defendant repeatedly acknowledged that he was entering his plea
9 freely and voluntarily and that no one had threatened him in order
10 to get him to change his plea. At the hearing, the following
11 exchanges occurred:

12 THE COURT: And you clearly understood what was in the plea
13 agreement; is that right?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: And you went over that with your counsel, Ms.
16 Boetsch?

17 THE DEFENDANT: I did.

18 THE COURT: And you're satisfied with her representation of
19 you?

20 THE DEFENDANT: Yes, Your Honor.

21

22 THE COURT: Did you execute this waiver freely and
23 voluntarily?

25 ² The government argues that defendant's claim that the plea was not
26 knowing and voluntary is procedurally defaulted because it was not raised
27 on direct review. *Bousley v. United States*, 523 U.S. 614, 621 (1998).
28 However, the nature of defendant's claim in this regard is such that it
could not have been fully reviewed on direct appeal, as he claims his plea
was based on the incompetent advice of counsel. Such claims are not subject
to procedural default. *See Massaro v. United States*, 538 U.S. 500, 504-05
(2003).

1 THE DEFENDANT: I did, Your Honor.

2 THE COURT: Did anyone threaten you or promise you anything
3 in exchange for doing that?

4 THE DEFENDANT: No, sir.

5

6 THE COURT: Did you freely and voluntarily sign the plea
7 agreement?

8 THE DEFENDANT: Yes, Your Honor.

9 THE COURT: Did anyone force you to sign it?

10 THE DEFENDANT: No, sir.

11 THE COURT: Did anyone promise you anything other than
12 what's in the agreement itself?

13 THE DEFENDANT: No, sir.

14 THE COURT: Has your attorney promised you anything other
15 than what's in the plea agreement?

16 THE DEFENDANT: No, sir.

17

18 THE COURT: Have you entered that plea freely and
19 voluntarily?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Has anyone threatened you or promised you
22 anything to have you plead guilty?

23 THE DEFENDANT: No, Your Honor.

24 THE COURT: Has your attorney Ms. Boetsch promised you
25 anything to plead guilty?

26 THE DEFENDANT: No, Your Honor.

27 (Tr. of Change of Plea Hr'g 5-8, 20-21).

28 "Statements made during a guilty plea hearing carry a strong

1 presumption of veracity in subsequent proceedings attacking the
2 plea." *United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008)
3 (internal punctuation omitted); *see also United States v. Grewal*,
4 825 F.2d 220, 223 (9th Cir. 1987); *United States v. Rubalcaba*, 811
5 F.2d 491, 494 (9th Cir. 1987). The court is entitled to credit
6 such sworn testimony over subsequent conflicting statements.
7 *United States v. Castello*, 724 F.2d 813, 815 (9th Cir. 1984).

8 Defendant appears to claim that his sworn responses cannot be
9 believed because he was mentally incompetent - due to substance
10 abuse, medications, and emotional distress - and because Boetsch
11 told him to say yes to everything. The court finds these claims to
12 be without merit. Defendant offers no evidence to support his
13 claim of substance abuse, a claim that is in fact contradicted by
14 his own expert's testimony at sentencing that defendant "had no
15 present or past substance abuse problems." (Doc. #60 (Sent. Tr.
16 12)). Defendant likewise offers no evidence that he was taking
17 medication that made him groggy or unable to comprehend the
18 proceedings - in fact, when the court asked defendant whether he
19 was on any medication, he said no. (Doc. #58 (Change of Plea Hr'g
20 Tr. 6)). While it is clear that defendant was emotional throughout
21 these proceedings, defendant has offered no evidence that his state
22 was such that he could not understand what was going on; in fact,
23 his responses to the court's questions make clear that he did
24 understand. Finally, defendant's claim that he should not be held
25 to the answers he gave at his change of plea because he was not
26 answering truthfully on advice of counsel is borderline frivolous.
27 Defendant's statements were made under sworn oath. Moreover,
28 defendant did not simply say yes to everything; his answers varied

1 depending on the question, between yes and no, and he acknowledged
2 in his own words that he had accessed with an intent to view child
3 pornography.

4 The court therefore finds defendant's current claim that he
5 was coerced into pleading guilty without merit and contrary to his
6 sworn statements to this court.³ His claim of ineffective
7 assistance of counsel based thereon is therefore **DENIED**.

8 **B. Ground Two**

9 In his second ground for relief, defendant asserts that
10 Boetsch was ineffective because she failed to investigate the case
11 and failed to file a motion to suppress the evidence obtained
12 during the search of his home and his interview with agents.

13 Defendant asserts that Boetsch should have investigated the
14 validity of the search warrant and moved to suppress the evidence
15 obtained during the search. In order to show an attorney was
16 ineffective for failing to file a motion to suppress, the defendant
17 must show that the motion would have been "meritorious and that
18 there is a reasonable probability that the verdict would have been
19 different absent the excludable evidence" *Kimmelman v.*
20 *Morrison*, 477 U.S. 365, 375 (1986). Defendant offers no evidence
21 or argument as to why the search warrant would likely have been
22 found invalid by this court. Defendant has not made any showing
23 that a motion to suppress the evidence seized during the search
24 would have been successful.

25
26 ³ Moreover, Boetsch refutes the claims. Boetsch states that "[a]t no
27 time was the plea related to a financial issue on my part." (Boetsch Aff.
28 2). She says she "never told him [she] would desert him due to financial
constraints and that he would have no attorney at all if he went to trial."
(Boetsch Aff. 7). She avers that she was willing and able to represent
defendant through trial if he could not honestly plead guilty to the charge.
(Boetsch Aff. 7).

1 Defendant asserts that Boetsch should have determined whether
2 the tape recording of his interview had been altered. However,
3 defendant offers no evidence that the tape recording had been
4 altered.

5 Relatedly, defendant argues that Boetsch should have filed a
6 motion to suppress the statements he made during his interview.
7 Defendant argues that he was questioned without an attorney present
8 and that the agents had made him believe that he was in custody. He
9 asserts that when he requested an attorney, the agents "threatened"
10 him. Defendant asserts that although his personal attorney called
11 while he was being interviewed, the agents did not let defendant
12 speak to him, did not stop the interview, and instead moved him
13 into another room to continue questioning. Further, defendant
14 argues that he was interviewed under duress.

15 In the plea agreement, which defendant signed, defendant
16 admitted that the interview with agents was consensual. (Doc. #25
17 at 5). Defendant now claims it was not. However, defendant
18 provides no evidence to support this claim, including importantly
19 the transcript of his interview or an audio recording thereof. It
20 is therefore entirely unsupported. In addition, the defendant
21 cannot show prejudice. The defendant's computer contained multiple
22 deleted child pornography files. Even without the admissions the
23 defendant made during his interview with the agents, there is no
24 reasonable probability that the defendant would have been
25 acquitted.

26 Finally, defendant asserts that Boetsch knew that a forensic
27 examination of the computer would have exonerated him of the
28 charges and that she was ineffective for failing to hire a forensic

1 expert. Defendant has not shown that a forensic examination of the
2 computer would have shown he was innocent or would have changed how
3 Boetsch advised him. In fact, Boetsch asserts that "[n]ever was
4 there expressed the idea that an expert search of his hard drive
5 would reveal he was innocent." (Doc. #65 (Boetsch Aff. 4)).

6 Moreover, Boetsch did investigate the evidence on the computer and
7 attempted to verify Davis' explanation of how the images and videos
8 came to be there, but neither she nor her agent were able to do so.

9 Defendant has therefore failed to establish either deficient
10 performance or prejudice with respect to any of the claims raised
11 in this second ground for relief.

12 **C. Ground Three**

13 In his third ground for relief, defendant asserts that Boetsch
14 failed to file a motion to dismiss the charges, failed to "preserve
15 Rights," and improperly advised him to waive his speedy trial
16 rights.⁴

17 Defendant claims that Boetsch said she would make the case go
18 away without charges being brought, and that if she could not she
19 would work to get the case dismissed. However, Boetsch never filed
20 any motion to dismiss the case, and defendant alleges she was
21 ineffective for failing to do so. Defendant identifies no basis
22 for dismissal of the charge against him. Further, defendant told
23 the court that he was satisfied with Boetsch's representation of
24 him and that she had not failed to do anything that he had asked
25 her to do. (Doc. #58 (Tr. of Change of Plea Hr'g 6, 21)).

26 Defendant's assertion that Boetsch failed to "preserve Rights"
27

28 ⁴ Defendant's third ground for relief contains additional assertions
that are the basis of other grounds for relief.

1 is vague and conclusory and therefore does not state any claim.

2 Defendant asserts that Boetsch improperly advised him to waive
3 his speedy trial act rights and that had she not done so the
4 charges against him would have been dismissed or the outcome of the
5 proceedings would have been different. Defendant has not
6 established that if he had not waived his speedy trial rights he
7 would have been entitled to dismissal of the charges or that the
8 outcome of the proceedings would have been different in his favor.
9 Importantly, defendant has not established that in the absence of a
10 speedy trial waiver that his case would not have proceeded to trial
11 within the time limits of 18 U.S.C. § 3161.

12 Defendant has not established either deficient performance or
13 prejudice with respect to any of the claims raised in his third
14 ground for relief.

15 **D. Ground Four**

16 In his fourth ground for relief, defendant asserts that
17 Boetsch lied to him and tricked him into pleading guilty by telling
18 him that the government had agreed orally to a probation only plea
19 deal, that the agreement he was signing was for probation, and that
20 he should just say yes to all the court's questions at the change
21 of plea hearing - regardless of whether the answers were true.
22 Defendant asserts that Boetsch did not go over the terms of the
23 plea agreement with him. In fact, defendant argues, the plea
24 agreement contains a number of false statements and admissions.
25 For these reasons, defendant asserts that he did not enter his
26 guilty plea knowingly and voluntarily.

27 Defendant's claim is contradicted by his signature on the plea
28 agreement, which represented that he had decided to plead guilty

1 voluntarily and no one had coerced him into doing so. (Doc. #25 at
2 13). It is further completely contrary to the statements he made at
3 his change of plea and sentencing hearings. The defendant told the
4 court that he clearly understood what was in the plea agreement and
5 that he went over it with his attorney. (Tr. Change of Plea Hr'g
6 5-6). Further, the court asked the defendant whether the facts set
7 forth on page four of the agreement were true to the best of
8 defendant's knowledge, and defendant answered "yes." *Id.* at 11.
9 The court also explained to defendant that it could sentence him
10 within or above the Guidelines' range up to maximum of ten years
11 imprisonment, which defendant indicated he understood. *Id.* at 13.
12 The court later asked, "Is there anything at this point that you
13 don't understand that we've gone over?" *Id.* at 19. The defendant
14 answered, "No, sir." *Id.* The court then specifically discussed
15 with defendant that under the Guidelines range he was facing, he
16 could be sentenced to between 78 and 97 months in prison. *Id.* at
17 19-20. The court stated: "[E]ven if I were to sentence you at the
18 low end of the guideline range, you're looking at more than six
19 years imprisonment without the possibility of parole." *Id.* at 20.
20 The court asked defendant if he understood that, and defendant
21 responded "Yes, Your Honor." *Id.* At no point in either the change
22 of plea hearing or the sentencing hearing did defendant express
23 surprise that he could be facing prison time when he believed that
24 he was entitled to probation.

25 The defendant's sworn statements during his change of plea
26 hearing show that he understood he could be sentenced to a term of
27 imprisonment. His current claim that he believed he could only
28 receive probation under the terms of the plea agreement therefore

1 lacks credibility. Further, to the extent that defendant was aware
2 that he could face prison time but had been told by Boetsch that he
3 would receive only probation, such claim is belied by defendant's
4 admission on the record that no one had promised him anything in
5 exchange for pleading guilty. The court concludes this claim is
6 entirely without merit.

7 **E. Ground Five**

8 Defendant asserts that Boetsch was ineffective with respect to
9 the Presentence Investigation Report ("PSR") because she failed to
10 object to several statements and recommendations therein. The
11 court has reviewed the specific objections defendant asserts
12 Boetsch should have made, set forth in his declaration from pages
13 83 to 89, and concludes that all such objections were either
14 actually made by Boetsch, are without merit, or were based directly
15 on admissions made by defendant in his plea agreement. Accordingly,
16 defendant has not established ineffective assistance of counsel
17 with respect to the alleged failure to object to the PSR.

18 Relatedly, defendant asserts that he did not know that a PSR
19 was going to be prepared, did not know what a PSR was, and did not
20 see or discuss the PSR with counsel before sentencing. These
21 assertions are contradicted by the record and are without merit.
22 The court advised the defendant that a presentence report was going
23 to be prepared. (Doc. #58 (Tr. of Change of Plea Hr'g 28-29)).
24 Further, the PSR was fully discussed in front of the defendant at
25 the time of sentencing, and at no time did defendant raise any
26 objections to the PSR - other than those made in writing by his
27 counsel - or advise the court that he allegedly had not seen or
28 discussed the PSR with counsel. (Doc. #60 (Sent. Tr. 2, 85, 95)).

1 In addition, the defendant has failed to show that he was
2 prejudiced by any alleged failure of counsel to discuss or review
3 the PSR with him.

4 **F. Ground Six**

5 Defendant asserts that Boetsch was ineffective with respect to
6 the sentencing memorandum because in it she: (1) improperly
7 admitted criminal conduct; (2) did not argue for the terms of an
8 "oral plea deal,"; (3) failed to object to "erroneous
9 enhancements"; and (4) failed to argue for a downward departure or
10 probation.⁵

11 1. The sentencing memo included a description of the criminal
12 conduct to which defendant pleaded guilty. It was therefore not
13 prejudicial or ineffective for Boetsch to include such information
14 in the memo. Further, to the extent that defendant contests
15 inclusion of the statements he made during his interview with
16 agents, Boetsch did attempt to clarify the statements defendant
17 claims were misconstrued. (Doc. #36 at 3). Although defendant
18 asserts that Boetsch improperly and falsely admitted that defendant
19 sometimes masturbated to child porn, defendant has not established
20 that he did not say this during his interview.

21 2. Defendant has not established that a probation only plea
22 agreement was ever offered by the government. Moreover, Boetsch
23 did argue for probation in the sentencing memorandum. (Doc. #36 at
24 5-8).

25 3. In the plea agreement, defendant stipulated to a Guidelines
26

27 ⁵ Defendant also argues that Boetsch improperly conceded a guideline
28 calculation of 28 instead of 15. The thirteen-level difference is
attributable to the enhancements defendant claims he should not have
received and therefore this claim is duplicative of his claim that Boetsch
failed to object to "erroneous enhancements."

1 calculation that included the enhancements. There was therefore no
2 basis for contesting the factual predicate for the enhancements.
3 To the extent there was a basis for arguing against the
4 enhancements, Boestch did make those arguments. She argued that on
5 policy grounds the enhancements were overly punitive. (Doc. #36 at
6 7-8; Doc. 60 (Sent. Tr. at 63-65)).

7 4. Boetsch did argue for a downward departure or probation.
8 (Doc. #36 at 5-8).

9 Defendant has failed to establish that Boestch's performance
10 was deficient or that he suffered any prejudice with respect to any
11 of the claims raised in his sixth ground for relief.

12 **G. Ground Seven**

13 Defendant asserts that Boetsch was ineffective at sentencing
14 because she failed to: (1) "object to the government"; (2) call a
15 computer expert to testify that the defendant did not warrant
16 enhancements for intentional use of a computer to access child
17 pornography, for the number of images, for images of pre-pubescent
18 children, and for images of children in sado-masochistic
19 situations; and (3) argue for probation instead of prison.⁶

20 Defendant's first assertion is vague and does not identify
21 what statements made by the government were false and not objected
22 to by Boetsch.

23 Defendant's second assertion is likewise meritless, as
24 defendant has not demonstrated that any expert would have given
25 such testimony.

26
27 ⁶ Defendant also asserts that Boetsch failed to "argue for the 'Plea
28 Deal' she had told Movant he had entered into [for Probation]." (Mot. 12).
As already noted, defendant has not established that the government had ever
offered him a probation only plea deal.

1 Defendant's third assertion is also without merit. Boetsch
2 did argue for a sentence of probation. (Doc. #60 (Sent. Tr. 66-
3 72)).

4 Defendant has not established either deficient performance or
5 prejudice with respect to any of the claims raised in his seventh
6 ground for relief.

7 **H. Ground Eight**

8 Defendant asserts that he was prejudiced by counsel's
9 cumulative errors. Ineffective assistance of counsel may be based
10 on the cumulative effect of errors. See *Wade v. Calderon*, 29 F.3d
11 1312, 1319 (9th Cir. 1994). Defendant has not established that
12 Boetsch's conduct fell below an objective standard of
13 reasonableness or that any errors were so prejudicial as to deprive
14 defendant of effective assistance of counsel.

15 **I. Additional Allegations**

16 The court has considered the entirety of defendant's
17 pleadings, including all allegations that do not appear in his
18 motion to vacate but instead are asserted as part of his
19 "declaration." All allegations that are not specifically addressed
20 in this order are found to be without merit.

21 **V. Request for Evidentiary Hearing**

22 Defendant has requested an evidentiary hearing on his claims.
23 Under 28 U.S.C. § 2255(b), the court must conduct a hearing on the
24 defendant's claims "[u]nless the motion and the files and records
25 of the case conclusively show that the [defendant] is entitled to
26 no relief." The court concludes the motion and the record in this
27 case conclusively show that defendant is not entitled to any relief
28 under § 2255. Accordingly, the request for an evidentiary hearing

1 is **DENIED**.

2 **VI. Request for Discovery**

3 Defendant's petition contains a conclusory "request for
4 discovery." (Doc. #45-1 at 5). Defendant does not identify any
5 particular discovery he seeks.

6 Defendant does not have an automatic right to conduct
7 discovery in this proceeding. See *Bracy v. Gramley*, 520 U.S. 899,
8 904 (1997); *United States v. Sewell*, 2012 WL 1928727, at *1 (E.D.
9 Cal. 2012). The court may, however, "for good cause, authorize
10 [the defendant] to conduct discovery under the Federal Rules of
11 Criminal Procedure or Civil Procedure, or in accordance with the
12 practices and principles of law." Rule 6(a) of the Rules Governing
13 Section 2255 Proceedings. Good cause exists "where specific
14 allegations before the court show reason to believe that the
15 petitioner may, if facts are fully developed, be able to
16 demonstrate that he is . . . entitled to relief. . . ." *Bracy*, 520
17 U.S. at 908-09. "A party requesting discovery must provide reasons
18 for the request." Rule 6(b) of the Rules Governing Section 2255
19 Proceedings. "The request must also include any proposed
20 interrogatories and requests for admission, and must specify any
21 requested documents." *Id.* Defendant does not specify any
22 documents, interrogatories or requests for admission. Accordingly,
23 the request for discovery is **DENIED**.

24 **VII. Request for Appointment of Counsel**

25 A "criminal defendant has no right to counsel beyond his first
26 appeal." *Coleman v. Thompson*, 501 U.S. 722, 756 (1991). The
27 decision to appoint counsel is generally discretionary. *Chaney v.*
28 *Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S.

1 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.),
2 cert. denied, 469 U.S. 838 (1984). However, the court must appoint
3 counsel where the complexities of the case are such that denial of
4 counsel would amount to a denial of due process, *Chaney*, 801 F.2d
5 at 1196, and where the petitioner is a person of such limited
6 education as to be incapable of fairly presenting his claims. See
7 *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970).

8 The defendant's assertions in this case are not complex and
9 defendant has been able to fairly present his claims. Accordingly,
10 the request for appointment of counsel is **DENIED**.

11 **VIII. Certificate of Appealability**

12 In order to proceed with an appeal, defendant must receive a
13 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App.
14 P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
15 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550,
16 551-52 (9th Cir. 2001). Generally, a defendant must make "a
17 substantial showing of the denial of a constitutional right" to
18 warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2);
19 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner
20 must demonstrate that reasonable jurists would find the district
21 court's assessment of the constitutional claims debatable or
22 wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*, 529 U.S. at 484).
23 In order to meet this threshold inquiry, the defendant has the
24 burden of demonstrating that the issues are debatable among jurists
25 of reason; that a court could resolve the issues differently; or
26 that the questions are adequate to deserve encouragement to proceed
27 further. *Id.*

28 This court has considered the issues raised by defendant, with

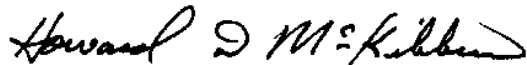
1 respect to whether they satisfy the standard for issuance of a
2 certificate of appealability, and determines that none meet that
3 standard. The court will therefore deny defendant a certificate of
4 appealability.

5 **IX. Conclusion**

6 In accordance with the foregoing, defendant's motion to
7 vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255
8 (#45) is hereby **DENIED**. Defendant's requests for discovery,
9 counsel, and an evidentiary hearing are **DENIED**. The court will not
10 grant defendant a certificate of appealability.

11 IT IS SO ORDERED.

12 DATED: This 2nd day of May, 2016.

13 
14

15 UNITED STATES DISTRICT JUDGE
16
17
18
19
20
21
22
23
24
25
26
27
28